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Stop studying wait lists

Other countries make it work, private care proponent says

By Matt Borsellino

VANCOUVER | Six months after it was rendered, the Supreme Court of Canada's Chaoulli decision allowing privately funded health-care services in Quebec has generated little but uncertainty and speculation.

Legal experts contradicted themselves frequently during a two-day conference here organized to clarify matters.

"Saving Medicare: Strategies and Solutions" attracted 300 lawyers, health-care providers and administrators, government policymakers and lobbyists from half a dozen countries to explore, among other things, what the impact of the decision will be outside Quebec.

On the eve of the conference, the Quebec government announced it will give the private sector a greater role in its provincial health system next month.

"Politicians have deferred to judges any decision on what role private funding will play, so the courts have a duty to rise above the political debate," said Dr. Brian Day, president and CEO of Cambie Surgeries Corp., an intervener in the Chaoulli case.

Implementation of the decision has been stunted by "propaganda and dishonest reporting," added the president of the fledgling Canadian Independent Medical Clinics Association, which hosted the event.

That's at least one area where the Chaoulli decision seems to have produced significant change, Canadian Taxpayers' Federation director John Williamson told the conference. "The media now question defenders of the status quo as they never did six months ago," he said.

Dr. Day, a nationally known proponent for privately funded services, disagrees with what he called "thinking lawyers," who say cases like Chaoulli need to be brought to the Supreme Court before the decision can be extended outside Quebec.

"There will never be another case," Dr. Day said during an exclusive interview. "There's no need for it. The reasons are political and go beyond legalities. . . . As you will see over the next year or two, wait lists in Quebec will plummet and the rest of the country will find that unless their home provinces conform, patients on wait lists will buy insurance and head to Quebec.

"I don't think any provincial government wants to go to court arguing that it's OK to wait and suffer in their province even though it's been decided it's not OK in Quebec. The future looks very bright. . . . I hope we can stop trying to study wait lists and get down to eliminating them."

The Chaoulli decision was far from clearcut. The court ruled four to three in the case brought by Montreal GP Dr. Jacques Chaoulli that Quebec's ban on private sector services was unconstitutional in light of some of the country's longest waiting times.

However, the court was split on whether the principle applies to the rest of Canada. It's such a complex, hot-button issue, that one member of the court, Marie Deschamps, abstained from voting on whether the decision should apply to provinces other than Quebec.

It didn't take long for that continuing controversy to produce clear disagreement among legal scholars at the conference here. Some said the ruling can be easily extended to other provinces, while others aren't so sure. Further, many predicted a similar case is likely to emerge but will have to land first in a provincial supreme court before reaching the federal high court. That could take years.

One British Columbia health ministry lawyer said it would be the definition of arbitrary if the courts limited the decision to Quebec by refusing to apply it elsewhere. University of British Columbia law professor Robin Elliot noted many laws vary from province to province, and it's possible the next case to reach the Supreme Court that's similar to Chaoulli could have a different outcome.

"I can't imagine the Supreme Court not validating a decision for other provinces that was applied to Quebec," argued Marvin Storrow, who appeared before the court in the Chaoulli case on behalf of a number of B.C.-based private clinics. "That would be absurd."

Several of the conference's speakers, though, reminded listeners that the Supreme Court is "not a constant." Only seven justices heard the Chaoulli case. Two more have since been appointed, and a third, John Major, is scheduled to retire soon.

"Legally, the Chaoulli decision applies only to Quebec," said Senator Michael Kirby, whose committee wrote a 2002 review of the national health system. "Politically, it applies to the whole country.

"It would be the ultimate example of a two-tier system if Quebec could buy health insurance to pay for publicly insured services, while Canadians living elsewhere were denied this right."

What could all this mean for the country's doctors? It may be telling that no one from the medical establishment—federal or provincial—addressed the conference.

Officials informed Dr. Day a week before the event that CMA president Dr. Ruth Collins-Nakai would have to cancel her scheduled appearance. The CMA was in the midst of "formulating policy," Dr. Day was told.

"My idea of formulating policy is not to take polls and then figure out what you believe in," he told the *Medical Post*. "My idea of leadership is to take a position you think is right and go with that position. Here's what it is: Most politicians are afraid of this issue, and most doctors are afraid of this issue. We need people speaking up who aren't afraid to open up the debate."

Michael Kirby, who peeked into the system's nooks and crannies during the Senate's review, said there will be a "substantial increase" in specialized clinics, particularly those providing orthopedic, diagnostic and ophthalmological services. That may even be as far as private sector involvement goes, he added. "But that might not be a bad thing because it will take a whole pile of procedures out of the public hospital structure," he noted.

Private clinics will need to be allowed to keep patients longer than the current 24 hours, Kirby said, and procedures done in clinics will likely be "simple" and "high volume."

There could also be a "strong move" to service-based funding, which could mean some hospitals and providers will lose income.

"These policy changes will encounter strong